EDITOR'S NOTE

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

87-1188
NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FRANK M. CASTANEDA,
PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION
SERVICE, KANSAS CITY, MISSOURI,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI--IMMIGRATION

ROMAN DE LA CAMPA
2219 Allan Street
Sioux City, Iowa 51103
(712) 258-8852
Attorney for Petitioner

34 pp

QUESTION PRESENTED

Whether the government can go against a decision of the United States District Court order revoking the breach of an immigration bond, when the Court resubmitted this matter to the government only for further proceedings consistent with said opinion.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

FRANK M. CASTANEDA,
Petitioner

V.

U.S. DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION
SERVICE, KANSAS CITY, MISSOURI,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF AEEPALS FOR THE
EIGHTH CIRCUIT

PETITION FOR CERTIORARI--IMMIGRATION

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its opinion in Case No. 86-2181 on September 15, 1987, with amendment to said decision on September 27, 1987. The opinion is not yet reported and has been reprinted at pages 1a to 6a in the Appendix filed herewith.

The related proceedings in the U.S. District Court for the Western District of Missouri, No. 85-040-CV-W-6 were unreported and reprinted on pp 7a-11a and 23a-28a.

The earlier opinions in this case of the Regional Commissioner are not reported and are reprinted on pp 13a-21a and 29a-34a

JURISDICTION

The judgment of the U.S.Court of Appeals for the Eighth Circuit was entered on September 15, 1987, with amendment on September 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

On December 16, 1987, Justice Blackmun extended time to file a petition for writ of certiorari up to and including January 13, 1988. This petition is filed on said date.

REGULATION INVOLVED

8 C.F.R. 103.6(e) states in pertinent part:

> "A bond is breached when there has been a substantial violation of the stipulated conditions."

STATEMENT

1. The Immigration and Naturalization District Director in Kansas City, Missouri, ruled that a $5,000.00 immigration bond posted in this case was breached on March 9, 1983 due to the non-appearance of the alien, the obligor, and his attorney, without consideration of the fact that Immigration Judge Brahos, in a telephone conversation with said attorney assented to a continuance. This oral authorization was confirmed by a certified letter that was sent by the obligor's attorney to the trial attorney.

2. The obligor appealed the decision of the INS District Director to the INS Administrative Appeals Unit. In said appeal petitioner contended:

> "The decision of the acting District Director in this case ordered the breach of the Immigration Bond regarding the above named beneficiary which was issued on December 28, 1981, receipt number KAN 431 and the breach number KAN 99 has been entered with disregard that the attorney's

alien Roman de la Campa kindly requested a continuance of the hearing on March 9, 1983 by cert. mail notice to trial attorney that said hearing was requested to be continued with previous consultation with the Immigration Judge, Brahos, after the matter was discussed with Mr. Briggs, U.S. Immigration Investigator, at Kansas City office on March 3, 1983, the undersigned reasonable did not surrender the alien at that time for the good cause above expressed.

Therefore, the order appealed herein must be revoked by the Regional Commissioner according with this appeal and attorney's brief and exhibits."

On January 5, 1984 the Regional Commissioner filed a decision, which in the pertinent part says as follows:

"In the instant case, the failure of of the alien to appear may have been unintentional, but counsel made an unwarranted assumption that his request for a continuance would granted. Counsel made no effort to contact Service personnel to ascertain the disposition of this request. To protect the interests of both the obligor and the aliens, the attorney has a responsibility to assure that the continuance would be granted or that the alien would appear for the hearing. The mere filing of a request for a continuance is not synonymous with the granting of continuance, as it does not excuse non-appearance...

Similarly, aliens must be produced by

the obligor in keeping with the terms of the bond regardless of the inconvenience to the obligor or counsel. The absence of a copy of the Order to Show Cause did not leave the attorney ignorant as to the nature of the hearing. He had represented the alien prior to his release from prision and knew that the person was subject to deportation at least for his felony conviction and sentence and presumably or his illegal entry into the United States. In correspondence with an immigration judge on December 18, 1981, counsel stated that the alien would be applying for suspension of deportation at the time of his deportation hearing.

In the absence of documentation from the immigration judge who counsel for the obligor alleges encouraged him to request a continuance, I conclude that the failure to produce the alien for the hearing on March 9, 1983 constitutes a substantial violation of the stipulated conditions of the bond. Accordingly, the appeal will be dismissed."

3. Petitioner filed a petition for review of said decision before the United States District Court, Western District of Missouri, (Western Division) on April 25, 1985. Said Court entered a judgment on February 12, 1986, which stated as follows:

"The present case is before the court on cross motions for summary judgment. The relevant facts are not in dispute and will be briefly stated.

On December 28, 1981, plaintiff posted an immigration bond in the amount of $5,000.00 on behalf of Mauro Gonzalez, an alien. As a condition of the bond, plaintiff agreed to produce the alien upon each and every request of an immigration officer. Exhibit D-4, Defendant's Motion for Dismissal or for Summary Judgment. By letter dated February 25, 1983, demand was made upon plaintiff to produce the alien at 2:30 p.m. on March 9, 1983. A letter of the same date was sent to the alien, with a copy to his attorney, Mr. Campa, requesting the alien's appearance for hearing at 2:30 p.m. on March 9, 1983. Plaintiff and Campa received these letters on February 28, 1983, but it is not clear from the record when, if ever, the alien received his.

At the time Campa received the above described notice, he had not received the notice to show cause or any other statement or allegations from the Immigration and Naturalization Service (INS). Plaintiff's Petition, ¶ 2. Plaintiff therefore telephoned Immigration Judge Brahos to request a continuance so that plaintiff could obtain a copy of the notice to show cause. Judge Brahos suggested that Campa submit a written request to the attention of the judge at the hearing. Campa indeed mailed such a request, which the trial attorney received on March 7, 1983.

Apparently assuming the continuance would be granted, neither the alien, plaintiff, nor Campa appeared for the March 9 hearing. The District Director notified plaintiff on March 11, 1983, that the bond had been breached, and this ruling was affirmed on appeal to the Regional Commissioner.

The pertinent INS regulation requires that a bond may be forfeited only upon

a 'substantial' breach of its conditions. 8 C.F.R. § 103.6(e). A determination of whether a breach is substantial requires examination of several factors, including the extent of the breach, whether it was intentional or accidental, whether it was in good faith, and whether the alien took steps to make amends or to place himself in compliance. Bahramizandeh v. INS, 717 F.2d 1170, 1173 (7th Cir. 1983); International Fidelity Insurance Co. v. Crosland, 490 F.Supp. 446, 448 (S.D.N.Y. 1980).

On facts very similar to the present case, the court in Gomez-Grandados v. Smith, 608 F.Supp. 1236 (D.Utah 1985), held that a breach was insubstantial. The alien's attorney in Gomez mailed a motion for continuance seven days before the scheduled appearance, which was recieved two days before the scheduled appearance. Pursuant to counsel's advice, neither the alien nor the obligor on the bond appeared, and the bond was held breached. The obligor was later notified that it was the Immigration court's practice to deny continuances absent the alien or counsel being present and moving for one on the record. The district court reversed, noting that counsel had no notice of the Immigration Court's practice of requiring an oral motion and that counsel has requested to be notified if there was any problem with the continuance.

While I am somewhat skeptical of the general language in the Gomez opinion indicating that a failure to appear is not a substantial breach if a motion for continuance has been filed, the Immigration court should at least give due consideration to the motion prior to finding the bond breached. It is not clear from the record in the present

case whether such consideration was in fact given. Moreover, in reviewing the revocation, the Regional Commissioner noted, but did not give explicit consideration, to the other factors relevant to a determination of whether a breach is substantial. In particular, the Commissioner failed to determine the extent of the breach, whether the alien made any attempt to place himself in compliance, or whether the breach was in good faith. Indeed, the only relevant finding made by the Commissioner was that the failure to appear 'may have been unintentional.' Exhibit D-10, Defendant's Motion to Dismiss or for Summary Judgment. I will therefore follow the lead of the court in International Fidelity Insurance Co. v. Crosland, 490 F.Supp. at 449, and remand this cause to the Commissioner for further proceedings consistent with this opinion. SO ORDERED."

4. On May 19, 1986 the Regional Commissioner entered a decision reaffirming the decision of the District Director, which in the pertinent part says as follows:

"...The record does not contain any evidence to establish that the obligor attempted to place himself in compliance with that demand. The action taken by the alien's attorney does not relieve the obligor from this duty. Further, the filing of a request for continuance by an attorney who is not counsel for nor privity with the obligor or the failure to receive a decision theron does not relieve the obligor of his responsibility to surrender the alien

on demand pursuant to the terms of a delivery bond where the obligor has not been relieved of this responsibility; Matter of Allied Fidelity Insurance Company, Interim Decision 2972 (Comm. 1984.)

Assuming arguendo that the alien's counsel properly represented the obligor, we conclude that the failure to follow up on the request for a continuance or verify the grant or denial of such request supports a finding that the alien's failure to appear was neither accidential nor in good faith. The extent of the breach was complete because the alien did not take steps to make amends or to put himself in compliance. He had to be apprehended by Service officers prior to his deportation on May 31, 1985.

We conclude that the inaction of the obligor, after being properly notified of the scheduled hearing and knowing the terms of the bond, extablishes that substantial violation has occurred in this matter. The decision of the district director is correct and proper and his decision to breach the bond will be affirmed.

ORDER: The decision of the district director is reaffirmed."

5. The defendant filed a Motion for Dismissal or for Summary Judgment on June 10, 1986. The U.S. District Court granted defendant's renewed motion for summary judgment. In doing so, the Court revoked

its previous order of February 12, 1986, which was res judicata. Said decision says in part:

> "Plaintiff next argues that the INS was not acting consistently with this Court's order to remand when it issued a decision favorable to defendant. I disagree. The INS reviewed this case under the legal standards set forth in this court's prior order and concluded that the bond was substantially breached. Plaintiff has made no showing that this conclusion is subject to attack for any of the reasons set forth in 5 U.S.C. § 706, and has shown no alternative basis for review. Accordingly, it is hereby
>
> ORDERED that defendant's Renewed Motion for Summary Judgment is GRANTED."

6. Petitioner filed an appeal before the United States Court of Appeals for the Eighth Circuit requesting that this case be remanded to the U.S. District Court, revoking their order of August 21, 1986, with additional instructions to the District Court to enforce the original order of the Court of February 12, 1986, and, in consequence, that the immigration bond be returned to the obligor. Said appeal

was based on the following arguments:

"1. The U.S. District Court cannot go against its own opinion when said opinion constitutes res judicata.

2. The INS Regional Commissioner, when receiving the order of the District Court for further proceedings according with the order of the District Court, failed to comply and proceeded with further arguments."

7. The United States Court of Appeals for the Eighth Circuit entered a decision on September 15, 1987, with amendment on September 27, 1987, which says as follows:

"This is an appeal from an order of the district court granting summary judgment in favor of the Immigration and Naturalization Service (INS) in appellant's declaratory judgment action that sought to invalidate the INS's order that the terms of an appearance bond had been breached. We affirm.

On December 28, 1981, appellant posted an immigration bond in the amount of $5,000.00 on behalf of Mauro Gonzalez, an alien. Under the terms of the bond, appellant agrees to produce Gonzalez upon each and every request of an immigration officer. Demand was made upon appellant to produce Gonzalez at 2:30 p.m. on March 8, 1983. Appellant thereupon call the immigration judge and requested a continuance so that appellant could obtain a copy of the notice to show cause that had triggered the demand for Gonzalez's appearance at the March 9 hearing. The immigration judge suggested that appell-

ant submit a written request for continuance to the INS attorney who was handling the case so that the request could be brought to the attention of the judge at the hearing. Appellant mailed, and trial attorney received, such a request.

Apparently assuming that the continuance would be granted, appellant, Gonzalez, and their attorney did not appear at the March 9 hearing. The district director of the INS notified appellant on March 11, 1983, that the bond had been breached. This ruling was affirmed on appeal to the regional commissioner of the INS.

On February 12, 1986, the district court entered an order remanding the case to the regional commissioner to determine whether Gonzalez' failure to appear at the March 9 hearing was a substantial breach of the conditions of the bond within the meaning of 8 C.F.R. § 103.6 (e). In the course of its ruling, the district court referred to several factors set forth in Bahramizadeh v. INS, 717 F.2d 1170, 1173 (7th Cir. 1983). The court also directed the commissioner to give due consideration to the fact that appellant had filed a motion for continuance, citing the district court's opinion in Gomez-Granados v. Smith, 608 F.Supp. 446, 448 (D. Utah 1985).

On reconsideration, the INS reaffirmed its prior ruling. The INS then filed a motion for summary judgment, asking the district court to confirm the forfeiture of the bond. In an order dated August 21, 1986, the district court stated that the INS had reviewed the case under the legal standards set forth in the court's February 12, 1986, order, and had concluded that the bond had been substantially breached. Although the district court indicated that it was troubled by

the result that it was required to reach inasmuch as the amount of the forfeiture penalty seemed excessive in the light of what appeared to be simply a 'no show' situation, it held that appellant had made no showing that the INS's finding was subject to attack and therefore affirmed the declaration of forfeiture.

On appeal to this court, appellant does not assert that the finding of material breach was incorrect, but rather argues that the district court's order of February 12, 1986, was final and conclusive on the factual and legal issues in controversy and that it required the regional commissioner to order the district director of the INS to refund the heretofore forfeited bond to appellant.

We do not agree with the interpretation that appellant has placed on the district court's February 12, 1986, order. It seems clear to us that that order directed the regional commissioner to review his earlier determination regarding the materiality of the breach, a directive that the district court's order of August 21, 1986, found the regional commissioner had complied with. Accordingly, we have no based upon which to reverse the district court's August 21 order.

In so holding, we share the concern expressed by the district court that the amount of the forfeiture penalty in this case on its face seems to exceed the gravity of the breach of the conditions of the bond. Had appellant presented this issue on appeal, we might very well have reached a result different from that reached by the district court. As it is. however, we must decide the case on the issues as presented to us, and on that basis we have no choice but to affirm the order appealed from.

The order is affirmed."

ARGUMENT

1. The initial decision of the United States District Court, dated February 12, 1986, and reproduced herein on pages 5 through 8, was consented to by the opposite party and was, therefore, res judicata.

2. The judgment of the United States District Court, referred to above, was grounded in the precedent of cases Bahramizandeh v. INS, 717 F.2d 1170, 1173 (7th Cir. 1983); International Fidelity Insurance Co. v. Crosland, 490 F.Supp. 446, 448 (S.D.N.Y. 1980); and Gomez-Granados v. Smith, 608 F.Supp. 1236 (D. Utah 1985). Said judgment established the clear opinion of the Court that the $5,000 immigration bond was not breached in this case. The Court ordered that the case be submitted to the Regional Commissioner for further proceedings consistent with the District Court's opinion.

3. The Regional Commissioner, instead of complying with the order of the Court, brought up new evidence and new factual situations, totally in an untimely manner and in complete misunderstanding of the intent of the Court's order. The District Court, upon receiving the answer from the Regional Commissioner, reconsidered its own previous decision and proceeded to change completely its stand on the case, ignoring that their previous order had been consented to by the opposing party and, therefore, had the value of res judicata.

4. The United States Court of Appeals for the Eighth Circuit, upon reviewing the decision of the U.S. District Court, entered an opinion expressing that the government has the power to review and change a United States District Court order and, in doing so, has acted according with the law and the constitution.

Petitioner's contention is the opposite, that the Regional Commissioner does not have the power to overthrow a decision of the U.S. District Court when the same had been consented to by the government representative in Court. Therefore, the only proper action for the Regional Commissioner is this case was to conduct further proceedings in order to reimburse the immigration bond to the petitioner.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Roman de la Campa
Attorney for Petitioner

January, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2181

Frank M. Castaneda, Appellant, v. U.S. Department of Justice, Immigration and Naturalization Service, Kansas City, Missouri, Appellees.	* * *

of an appearance bond had been breached. We affirm.

On December 28, 1981, appellant posted an immigration bond in the amount of $5,000.00 on behalf of Mauro Gonzalez, an alien. Under the terms of the bond, appellant agreed to produce Gonzalez upon each and every request of an immigration officer. Demand was made upon appellant to produce Gonzalez at 2:30 p.m. on Mrach 9, 1983. Appellant thereupon called the immigration judge and requested a continuance so that appellant could obtain a copy of the notice to show cause that had triggered the demand for Gonzalez's appearance at the March 9 hearing. The immigration judge suggested that appellant submit a written request for continuance to the INS attorney who was handling the case so that the request could be brought to the attention of the judge at the hearing. Appellant mailed, and the trial attorney received, such a req-

uest.

Apparently assuming that the continuance would be granted, appellant, Gonzalez, and their attorney did not appear at the March 9 hearing. The district director of the INS notified appellant on March 11, 1983, that the bond had been breached. This ruling was affirmed on appeal to the regional commissioner of the INS.

On February 12, 1986, the district court entered an order remanding the case to the regional commissioner to determine whether Gonzalez' failure to appear at the March 9 hearing was a substantial breach of the conditions of the bond within the meaning of 8 C.F.R. § 103.6(e).[1] In the course of its ruling, the district court referred to several factors set forth in Bahramizdeh

---

[1] 8 C.F.R. § 103.6(e) states in applicable part:

A bond is breach when there has been a substantial violation of the stipulated conditions.

v. INS, 717 F.2d 1170, 1173 (7th Cir. 1983). The court also directed the commissioner to give due consideration to the fact that appellant had filed a motion for continuance, citing the district court's opinion in Gomez-Granados v. Smith, 608 F.Supp. 446, 448 (D. Utah 1985).

On reconsideration, the INS reaffirmed its prior ruling. The INS then filed a motion for summary judgment, asking the district court to confirm the forfeiture of the bond. In an order dated August 21, 1986, the district court stated that the INS had reviewed the case under the legal standards set forth in the court's February 12, 1986, order, and had concluded that the bond had been substantially breached. Although the district court indicated that it was troubled by the result that it was required to reach inasmuch as the amount of the forfeiture penalty seemed excessive in the light of what

appeared to be simply a "no show" situation it held that appellant had made no showing that the INS's finding was subject to attack and therefore affirmed the declaration of forfeiture.

On appeal to this court, appellant does not assert that the finding of material breach was incorrect, but rather argues that the district court's order of February 12, 1986, was final and conclusive on the factual and legal issues in controversy and that it required the regional commissioner to order the district director of the INS to refund the heretofore forfeited bond to appellant.

We do not agree with the interpretation that appellant has placed on the district court's February 12, 1986, order. It seems clear to us that that order directed the regional commissioner to review his earlier determination regarding the materiality of the breach, a directive that the district court's order of August

21, 1986, found that the regional commissioner had complied with. Accordingly, we have no basis upon which to reverse the district court's August 21 order.

In so doing, we share the concern expressed by the district court that the amount of the forfeiture penalty in this case on its face seems to exceed the gravity of the breach of the conditions of the bond. Had appellant presented this issue on appeal, we might very well have reached a result different from that reached by the district court. As it is, however, we must decide the case on the issues as presented to us, and on that basis we have no choice but to affirm the order appealed from.

The order is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FRANK M. CASTANEDA, Plaintiff,	)	
v.	)	No. 85-040-CV-W-6
U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI, Defendants	)	

ORDER

Before the court is defendant's Response to Order or Remand and Renewed Motion for Summary Judgment. A brief recitation of the procedural history of this case will proceed a ruling on the pending motion.

Plaintiff was the obligor on a bond with the Immigration and Naturalization Service (INS) for the production of an alien. The INS subsequently declared the bond breached, and the plaintiff instituted this declaratory judgment action, seeking

a ruling invalidating the INS' order. The issues were presented to the court cross motions for summary judgment and, by order of February 12, 1986, the cause was remanded to the INS for a determination of whether the bond was "substantially" breached, as contemplated by 8 C.F.R. § 03.6(e). On reconsideration, the INS reaffirmed its prior ruling that the bond had been breached and that the breach was substantial. Defendant then filed the present motion, asking the court to "confirm the forfeiture of the plaintiff's bond and award defendants summary judgment."

In opposition, plaintiff initially alleges that the court lacks subject matter jurisdiction to grant the relief requested by defendant. This argument is in apparent conflict with plaintiff's simultaneous prayer for affirmative relief. In any event, I conclude that the pending

motion is properly before the court if for no other reason than the fact that a district court retains jurisdiction to enforce its judgment. E.g. City of Las Vegas v. Clark County, 775 F.2d 697, 701 (9th Cir. 1985); Southmark Properties v. Charles House Corp., F.2d 862, 868 (tth Cir. 1984).

Plaintiff also argues that the motion should be denied because this court's prior order remanded the case to the Commissioner of the INS, but subsequent review was actually conducted by the Chief of the Administrative Appeals Unit of INS. This argument is without merit. The Chief of the Administrative Appeals Unit acts under the direction and supervision of the Associate Commissioner for Examinations. 8 C.F.R. § 103.1(f)(1)(v). The Associate Commissioner for Examinations, pursuant to delegated authority from the Commissioner, 8 C.F.R. § 103.1(f)(2)(i), has appel-

late jurisdiction over decisions on breaching bonds. The Chief of the Administrative Appeals Unit was therefore acting under properly delegated wuthority when he made the decision in this case.

Plaintiff next argues that the INS was not acting consistently with this court's order of remand when it issued a decision favorable to the defendant. I disagree. The INS reviewed this case under the legal standards set forth in this court's prior order and concluded that the bond was substantially breached. Plaintiff has made no showing that this conclusion is subject to attack for any of the reasons set forth in 5 U.S.C. § 706, and has shown no alternative basis for review.* Accordingly, it is hereby

ORDERED that defendant's Renewed Motion for Summary judgment is GRANTED.

---

*The result here is, however, troubling. The amount of the bond was presumably set to deter flight. The penatly seems excessive if applied simply to a "no show" situation.

/s/
HOWARD F. SACHS
UNITED STATES DISTRICT
JUDGE

DATED: Aug. 21, 1986.

U.S. Department of Justice
Immigration and Naturalization Service

425 Eye Street N.W.
Washington, D.C. 20536

FILE: A22 726 116 Kansas City

IN RE: Obligor: Frank M. Castañeda
Alien: Mauro Gonzalez-Gonzalez

IMMIGRATION BOND: Bond Conditioned for the Delivery of an Alien Pursuant to Section 103 of the Immigration and Nationality Act, 8 U.S.C. 1103

IN BEHALF OF OBLIGOR: Roman de la Campa
2219 Allan Street
Sioux City, IA 51103

DISCUSSION: The district director declared the immigration bond breached on March 9, 1993. We affirmed that decision on appeal. The matter is now before us on remand from the Federal District Court to reconsider that decision consistent with the Court's opinion. The decision of the district director to breach the bond will be reaffirmed.

A $5,000 bond conditioned for the delivery

of an alien was posted on December 29, 1981. As a condition of the bond the obligor agreed to produce the alien upon each and every request of an immigration officer. Written demand was served on the obligor, the alien, and the alien's attorney to present the bonded alien at a specific Service office on March 9, 1983. The record reveals that certified notices numbers 32229, 32230, and 32231 were all received by the respective addresses on February 28, 1983. The obligor failed to present the alien and the alien failed to present himself, pursuant to the terms of the bond. The district director when declared that the conditions of the bond had been violated and breached the bond accordingly.

On appeal the obligor states that the district director disregarded the fact that the alien's attorney, Roman de la Campa, requested a continuance of the scheduled

hearing based on a consultation with the immigration judge and a Service investigator, and concluded that surrendering the alien was unnecessary. Counsel's reason for requesting the continuance was that he was not in possession of a copy of the Order to Show Cause which was mailed to the alien on April 7, 1980 after counsel had mailed proper notice of entry as representation, Form G-28, on April 4, 1980. The record shows that a request for a continuance was received by the Service on March 7, 1983. The obligor argues on appeal that the district director should not have ignored the request for a continuance. Neither the obligor, the alien, nor the alien's counsel appeared for the hearing, apparently assuming the continuance would be granted.

We dismissed the appeal holding that the failure of the alien to appear may have been unintentional, but counsel made an

unwarranted assumption that his request for a continuance would be granted. Counsel made no effort to contact Service personnel to ascertain the disposition of this request and it does not excuse non-appearance.

Upon review in district court, the judge remanded the record for a determination whether the breach is substantial pursuant to 8 CFR 103.6(e) and a determination of the extent of the breach, whether the alien made any attempt to place himself in compliance, or whether the breach was in good faith as discussed in International Fidelity Insurance Company v, Crosland, 490 F.Supp. 446 (1980).

In that case the Service notified the obligor of the scheduled hearing but failed to notify the bonded alien. The obligor in turn notified the alien's attorney but neglected to notify the alien. Upon learnint that he had missed the scheduled hear-

ing, the alien attempted to rectify the situation. That matter was remanded to determine whether the violation was substantial. In International Fidelity Insurance Company v. Crosland, 516 F.Supp. 21 (1981), the Service notified both the obligor and the alien's attorney of record of the scheduled date of the hearing. However, in that matter the obligor did not produce the alien but only sent his current address to the Service. It was held in that matter that substantial violation had occurred.

Delivery bonds are formal instruments governed by the general provisions of 8 CFR 103.6(a), (b), and (e). These instruments create a contract between the Service, the bonding agent and attroney-in-fact, and the surety company. There is, however, no contract between the Service and one who posts collateral with the bonding agent to secure the delivery bond, or between

the Service and the named alien, or his attorney.

There is no evidence in the record to indicate that the alien's attorney has filed Form G-28 to indicate he represents the obligor. The first reference to a possible connection between the two parties appears on the face of the appeal dated March 22, 1983 which contains the names and signatures of both parties.

The delivery bond constitutes a contract between the United States Government and the obligor to produce and deliver a named alien upon each and every request by an officer of the Service; United States v. Olson, 47 F.2d 1070 (8th Cir. 1931). The conditions of the delivery bond are specific. They are violated if the obligor fails to cause the alien to be produced upon each and every request until deportation; Matter of Smith, 16 I&N Dec. 146, 151 (R.C. 1950). The obligor's duty to

deliver the named alien is not lessened becuase the alien, on advice of counsel, does not believe that he is required to appear. See Matter of L--, 3 I&N Dec. 862 (R.C. 1950).

In this matter the Service sent notices to appear to the obligor, the bonded alien, and the alien's attorney fulfinning the requirements of 8 CFR 242.1(b) and 103.5a (2) respecting the service of notice. The record does not contain any evidence to establish that the obligor attempted to place himself in compliance with that demand. The action taken by the alien's attorney does not relieve the obligor from this duty. Further, the filing of a request for continuance by an attorney who is not counsel for nor in rivity with the obligor or the failure to receive a decision thereon does not relieve the obligor of his responsibility to surrender the alien on demand pursuant to the terms of

a delivery bond where the obligor has not been releived of this responsibility; Matter of Allied Fidelity Insurance Company, Interim Decision 2972 (Comm. 19840.

Assuming arguendo that the alien's counsel properly represented the obligor, we conclude that the filaure to follow up on the request for a continuance or verify the grant or denial of such request supports a finding that the alien's failure to appear was neither accidential nor in good faith. Th extent of the breach was complete because the alien did not take steps to make amends or put himself in compliance. He had to be apprehended by Service officers prior to his deportation on May 31, 1985.

We conclude that the inaction of the obligor, after being properly notified of the scheduled hearing and knowing the terms of the bond, establishes that substantial violation has occurred in this

matter. The decision of the district director is correct and proper and his decision to breach the bond will be affirmed.

ORDER: The decision of the district director is reaffirmed.

DATED: 19 MAY 1986

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS

's'
Lawrence J. Weinig, Chief
Administrative Appeals Unit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FRANK M. CASTANEDA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 85-0400-CV-W-6
	)	
U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, KANSAS CITY, MISSOURI,	)	
	)	
Defendants.	)	

ORDER

The present case is before the court on cross motions for summary judgment.[1] The relevant facts are not in dispute and will be briefly stated.

On December 28, 1981, plaintiff posted as immigration bond in the amount of $5,000.00 on behalf of Mauro Gonzalez, an alien. As a condition of the bond, plain-

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[1]Plaintiff's motion is actually one for judgment on the pleadings. Authorities and arguments outside the pleadings have been submitted, however, and the motion will there be treated as one for summary judgment. See Fed.R.Civ.P. 12(c)

tiff agreed to produce the alien upon each and every request of an immigration officer. Exhibit D-4, Defendant's Motion for Dismissal or for Summary Judgment. By letter dated February 25, 1983, demand was made upon plaintiff to produce the alien at 2:30 p.m. on March 9, 1983. A letter of the same date was sent to the alien, with a copy to his attorney, Mr. Campa, requesting the lien's appearance for hearing at 2:30 p.m. on March 9, 1983, but it is not clear from the record when, if ever, the alien received his.

At the time Campa received the above described notice, he had not received the notice to show cause or any other statement of allegations from the Immigration and Naturalization Service (INS). Plaintiff's Petition ¶ 2. Plaintiff therefore telephoned Immigration Judge Brahos to request a continuance so that

plaintiff could obtain a copy of the notice to show cause. Judge Brahos suggested that Campa submit a written request for continuance to the trial attorney, to be brought to the attention of the judge at the hearing. Campa indeed mailed such a request, which the trial attorney received on March 7, 1983.

Apparently assuming that the continuance would be granted, neither the alien, plaintiff, nor Campa appeared for the March 9 hearing. The District Director notified plaintiff on March 11, 1983, that the bond had been breached, and this ruling was affirmed on appeal to the Regional Commissioner.

The pertinent INS regulation requires that a bond may be forfeited only upon a "substantial" nreach of its conditions. 8 C.F.R. § 103.6(e). A determination of whether a breach is substantial requires examination of several factors, including

the extent of the breach, whether it was intentional or accidential, whether it was in good faith, and whether the alien took steps to make amends or to place himself in compliance. Bahramizandeh v. INS, 717 F.2d 1170, 1173 (7th Cir. 1983); International Fidelity Insurance Co. v. Crosland, 490 F.Supp. 446, 448 (S.D.N.Y. 1980).[2]

On facts very similar to the present case, the court in Gomez-Granados v. Smith, 608 F.Supp. 1236 (D.Utah 1985), held that a breach was insubstantial. The alien's attorney in Gomez mailed a motion for continuance seven days before the alien's scheduled appearance, which was received two days before the scheduled appearance. Pursuant to counsel's advice, neither the alien not the obligor on the bond appeared, and the bond was

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[2]Forfeitures are of course strongly disfavored, and the amount in controversy appears greatly to exceed any real loss by the Government, even considering possible loss of time at the scheduled hearing.

held breached. The obligor was later notified that it was the Immigration court's practice to deny continuances absent the alien or counsel being present and moving for one on the record. The district court reversed, noting that counsel had no notice of the Immigration court's practice of requiring an oral motion and that counsel has requested to be notified if there was any problem with the continuance.

While I am somewhat skeptical of the general language in the Gomez opinion indicating that a failure to appear is not a substantial breach if a motion for continuance has been filed, the Immigration court should at least give due consideration to the motion prior ro finding the bond breached. It is not clear from the record in the present case whether such consideration was in fact given. Moreover, in reviewing the revocation, the Regional Commissioner noted, but did not give explicit

consideration, to the other factors relevant to a determination of whether a breach is substantial. In particular, the Commissioner failed to determine the extent of the breach, whether the alien made any attempt to place himself in compliance, or whether the breach was in good faith.[3] Indeed, the only relevant finding made by the Commissioner was that the failure to appear "may have been unintentional." Exhibit D-10, Defendant's Motion to Dismiss or for Summary Judgment. I will therefore follow the lead of the court in International Fidelity Insurance Co. v. Crosland, 490 F.Supp. at 449, and remand this cause to the Commissioner for further proceedings consistent with this opinion. SO ORDERED.

/s/
Howard F. Sachs
United States District Judge

DATED: 2-18-1986

[3]Although the alien was taken into custody, it is not clear that self-surrender could not have been arranged.

U.S. Department of Justice
Immigration and Naturalization Service

425 Eye Street N.W.
Washington, D.C. 20536

File A22 726 116 Kansas City

IN RE: Bond COnditioned for the Delivery of an Alien Posted by Frank M. Castaneda on behalf of Mauro Gonzalez-Gonzalez

BOND BREACH PROCEEDINGS

IN BEHALF OF OBLIGOR: Roman de la Campa
Attorney at Law
2219 Allan Street
Sioux City, Iowa
51103

DISCUSSION: This matter is before the Commissioner on appeal from the decision of the District Director declaring the Immigration bond was breached as of March 9, 1983.

The record reflects that a $5,000 bond conditioned for the delivery of an alien was posted on December 28, 1981. A written demand for the alien's surrender was provided by "certified mail - return receipt requested" to the obligor on February

25, 1983. The written demand informed the obligor to surrender the alien to this Service on March 9, 1983, at the Service office in Kansas City, Missouri, at 2:30 pm. The obligor failed to present the alien and the alien failed to present himself, pursuant to the terms of the delivery bond. On March 11, 1983, the District Director informed the obligor that the conditions of the bond had been violated and, accordingly, the bond had been breached on March 9, 1983.

On appeal, counsel for the obligor states that he promptly filed a request for continuance with the trial attorney on the advice of the immigration judge, when he discovered that neither he nor the respondent had a copy of the Order to Show Cause upon which the March 9, 1983 hearing was to be based. Counsel states that he first contacted the Service office and an investigator referred him to the immigration

judge in Chicago. That judge advised him to request a continuance from the trial attorney until a copy of the Order to Show Cause could be provided to him and the respondent. Counsel provides a copy of certified mail receipt showing that his letter and request for continuance was received by the Service on March 7, 1983. Counsel for the obligor concludes that the District Director should not have ignored the request for continuance at the time that the District Director was deciding that bond had been breached.

In International Fidelity Insurance Company v. Crosland, 490 F.Supp. 446 (S.D.N. Y. 1980), the court remanded the matter of a breached delivery bond to the Regional Commissioner to determine the substantiality of a violation, where the obligor had also failed to produce an alien as requested by the Service. Making reference to the change in federal regulations concern-

ing violations which would cause a surety bond to be breached, the court said:

> The addition of the "substantiality" requirement would seem to require some evaluation of such factors as the extent of the breach, whether it was intentional or accidential on the part of the alien, whether it was in good faith and whether the alien took steps to make amends or put himself in compliance.

In the instant case, the failure of the alien to appear may have been unintentional, but counsel made an unwarranted assumption that his request for a continuance would granted. Counsel made no effort to contact Service personnel to ascertain the disposition of this request. To protect the interests of both the obligor and the aliens, the attorney has a responsibility to assure that the continuance would be granted or that the alien would appear for the hearing. The mere filing of a request for a continuance is not synonymous with the granting of continuance, as it does not excuse non-appearance.

Matter of L--, 3 I&N Dec. 862 (Comm. 1950)

states in part:

> Delivery bonds are exacted to insure the aliens will be produced when required by this Service for hearings or deportation.' They are necessary in order that the Service may discharge its functions in an orderly manner. The courts have taken cognizance of the confusion which would result if aliens surrendered at any time it suited their or surety's convenience.

Similarly, aliens must be produced by the obligor in keeping with the terms of the bond regardless of the inconvenience to the obligor or counsel. The absence of a copy of the Order to Show Cause did not leave the attorney ignorant as to the nature of the hearing. He had represented the alien prior to his release from prison and knew that the person was subject to deportation at least for his felony conviction and sentense and presumably for his illegal entry into the United States. In correspondence with an immigration judge on December 18, 1981, counsel stated that the alien would be applying for suspension

of deportation at the time of his deportation hearing.

In the absence of documentation from the immigration judge who counsel for the obligor alleges encouraged him to request a continuance, I conclude that the failure to produce the alien for the hearing on March 9, 1983 constitutes a substantial violation of the stipulated conditions of the bond. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

DATE JAN 5 1984

Andrew J. Carmichael, Jr.
Associate Commissioner,
Examinations